STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-682

VERIZON-MAINE
Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)

July 23, 2004

EXAMINER'S REPORT

NOTE: This Report contains the recommendation of the Hearing Examiner. Although it is in the form of a draft of a Commission Order, it does not constitute Commission action. Parties may file responses or exceptions to this Report on or before **noon on August 6, 2004**. It is expected that the Commission will consider this report at a special deliberative session on **August 12, 2004**.

I. SUMMARY

In this Order, we find that Verizon must include all of its wholesale offerings, including unbundled network elements (UNEs) provided pursuant to section 271 of the Telecommunications Act of 1996 (TelAct), in its state wholesale tariff. We also find that Verizon must continue to offer line sharing pursuant to Checklist Item No. 4 of section 271. Finally, we decline the opportunity to exercise any authority we might have to set rates for section 271 UNEs.

II. BACKGROUND

In our Comments to the Federal Communications Commission (FCC) regarding Verizon's section 271 application for authority to enter the interLATA toll market (Verizon's 271 Application), we stated that the availability of a wholesale tariff or Statement of Generally Available Terms would greatly reduce the time required to effect a valid interconnection agreement and would also eliminate the perception shared by some CLECs that they were being "forced" to accept contract terms in their interconnection agreements that were unrelated to the terms that they were interested in negotiating.[1] Thus, in a March 1, 2002 letter from the Commission to Verizon (Commission's 271 Letter), we explicitly conditioned our support of Verizon's 271 Application on Verizon's agreement to fulfill a number of additional requirements, including the filing of a wholesale tariff. Verizon committed to meeting the Commission's conditions in a March 4, 2002 letter to the Commission and on November 1, 2002, Verizon submitted a schedule of terms, conditions and rates for Resold Services (P.U.C. No. 21) and the provision of Unbundled Network Elements and Interconnection Services (P.U.C. No. 20) along with cost studies for certain non-recurring charges and OSS-related issues.

In order to allow enough time to thoroughly examine the tariff, we suspended it on November 11, 2002. On November 13, 2002, the Hearing Examiner issued a Procedural Order requesting intervention and scheduling an initial Case Conference for December 10th. On December 4, 2002, prior to the Case Conference, the Hearing Examiner issued a second Procedural Order granting intervention to all parties that requested it[2] and proposing a schedule for processing this case. Between December

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[1] *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization To Provide In-Region, InterLATA Services in the State of Maine,* CC Docket No. 02-61, Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of Telecommunications Act of 1996 (April 10, 2002) at 7.

[2] The parties include: OPA, ASCENT, WorldCom, Mid-Maine Tele-communications, and Oxford Networks. Mid-Maine and Oxford filed joint briefs as the CLEC Coalition.

2002 and August 2003, the parties conducted some discovery and attempted to identify all the issues that need to be litigated.[3]

On August 11, 2003, the Hearing Examiner issued a Procedural Order setting a hearing date of October 2, 2003, and attaching a list of issues that the Advisors intended to explore at the hearing. Before a hearing could take place, however, on August 21, 2003, the FCC issued its *Triennial Review Order (TRO)*.[4] A case conference was held on September 16, 2003, to discuss with the parties the potential impact of the *TRO* on the wholesale tariff. On September 18, 2003, the Examiner issued a Procedural Order summarizing the September 16th case conference and setting deadlines for Verizon to file new red-lined tariff schedules based on the changes required by the *TRO*.

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[3]At the Case Conference on December 10th, the proposed schedule was discussed and on December 17th the Hearing Examiner issued a Procedural Order to grant three additional interventions (Great Works Internet, Conversent Communications, and Cornerstone Communications**)** and to set a preliminary schedule. On January 15, 17, and 23, and February 3, 2003, the Hearing Examiner issued Procedural Orders adjusting the case schedule and outlining further instructions and an initial list of issues to be litigated in the proceeding. On January 22nd, the CLEC Coalition and Cornerstone Communications also filed a list of initial issues. On February 3, 7, and 14, 2003, Verizon submitted responses to Staff's and other parties' issues and questions. On February 18, 2003, both Staff and the CLEC Coalition filed a list of issues that Verizon should attempt to address in its testimony. On February 24, 2003, the Hearing Examiner issued a Procedural Order establishing a schedule for testimony and discovery. On March 3, 2003, the Commission suspended the Verizon tariff for a second time to allow additional time to review it. On March 24, 2003, Verizon witnesses filed panel testimony. Staff issued its first set of data requests on the Verizon testimony on April 1, 2003, to which Verizon responded on April 22nd and 23rd. On May 20, 2003, Verizon issued discovery requests to GWI, to which GWI responded on May 27th.

[4]Report and Order and Order on Remand and Further Notice of Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 96-98 *et al*., FCC03-36, 18 FCC Rcd 16978 (rel. August 21, 2003)(*Triennial Review Order or TRO).*

On October 16, 2003, the CLEC Coalition filed a Motion for Issuance of Temporary Order. In its Motion, the CLEC Coalition objected to a letter sent by Verizon on October 2nd which stated that Verizon would be discontinuing the provisioning of certain UNEs in compliance with the *TRO*. On October 21, 2003, the Hearing Examiner issued a Procedural Order stating that Verizon had correctly identified those UNEs that the FCC eliminated from the TelAct's section 251 unbundling requirements and that while changes in terms and conditions caused by the *TRO* would be litigated in this proceeding, the Commission would not re-litigate the decision by the FCC to eliminate specific UNEs from section 251's requirements. Finally, the Examiner stated that the Commission had not anticipated the need to address Verizon's continuing obligations under section 271 in this proceeding and that the Advisors would further consider the issues and determine the next steps.

On December 16, 2003, a case conference was held. After discussion, the Hearing Examiner determined that before hearings on the substance of the Wholesale Tariff could be held, legal briefing was necessary on two issues: (1) whether the Commission had authority, under either state or federal law, to require Verizon to tariff its obligations to continue providing unbundled network elements (UNEs) under section 271 of the TelAct and whether it could set the rates for those obligations; and (2) whether the Commission has the authority, under either state or federal law, to order Verizon to continue providing line-sharing at Commission-set TELRIC rates.

On January 16, 2004, Initial briefs were filed by Verizon-Maine (Verizon), the CLEC Coalition, and the Consolidated Intervenors (Biddeford Internet Company d/b/a Great Works Internet (GWI), the Office of the Public Advocate (OPA) and Cornerstone

Communications (CC)). The same parties filed reply briefs on January 30, 2004.

Before a decision could be reached by the Commission on the legal issues, the D.C. Circuit Court of Appeals issued its decision in *USTA II,* [5] the appeal of the *TRO.* Because *USTA II* was directly relevant to many of the legal issues raised in this Docket, the Hearing Examiner issued a Procedural Order on March 4, 2004, allowing all parties to supplement previously filed briefs to address the impact of the D.C. Circuit Court decision on their positions in this case. On March 26, the Consolidated Intervenors filed a supplemental brief, as did Verizon. The arguments from all parties in the three rounds of briefs are summarized below along with our analysis and decision.

III. COMMISSION AUTHORITY TO REQUIRE TARIFFING OF SECTION 271 OFFERINGS

A. Introduction

As will be explained in detail below, at the time we conditioned our support of Verizon's 271 Application on Verizon filing a wholesale tariff, Verizon's unbundling obligations under sections 251/252 of the TelAct were synonymous with its section 271 unbundling obligations. Thus, we made no distinction between the two potentially differing obligations; we simply required a wholesale tariff. Since that time, the *USTA I* decision was released, the FCC issued its *TRO,* and, most recently, the *USTA II* decision was issued. The impact of these three decisions on the issue at hand can be summed up as follows: today an ILEC's 251/252 obligations are narrower (in most

[5] *U.S. Telecomm. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)(*USTA II).*

respects[6]) than its 271 obligations. The CLECs contend that Verizon must now amend its proposed wholesale tariff to include its section 271 unbundling obligations. Verizon argues that the FCC has exclusive jurisdiction over matters relating to its 271 obligations and that this Commission has no authority to require Verizon to amend its wholesale tariff to include its 271 obligations.

B. Applicable Law

Section 271 of the TelAct sets forth the requirements an ILEC must meet before it will be allowed to enter the interLATA toll market. The so-called "competitive checklist" contains 14 measures which were intended to ensure that the ILEC had opened the local exchange market to competition. Checklist Item No. 2 requires "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252 (d)(1)." Section 251(c)(3) requires ILECs to provide access to their network, i.e. UNEs, while Section 252(d)(1) sets the pricing standard for those UNEs, i.e., TELRIC pricing. Section 251(c)(3) also requires compliance with section 251(d)(2) which limits access to UNEs at TELRIC pricing to only those which meet the "necessary and impair" standard.[7] Thus, Checklist Item No. 2 requires an ILEC to meet

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[6]In a recent order in the *Skowhegan Online Proceeding,* we found that subloops were a requirement under Section 251 but not a requirement under Section 271. *Investigation of Showhegan Online's Proposal for UNE Loops*, Docket No. 2002-704, Order (April 20, 2004), and Order Denying Reconsideration (June 16, 2004).

[7]In the *TRO,* the FCC retained its earlier definition of "necessary" ("…a proprietary network element is 'necessary' within the meaning of section 251(d)(2)(A) if, taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element would, as a practical, economic, and operational matter, *preclude* a requesting carrier from providing the services it seeks to offer.") and adopted a new definition of "impairment" ("A requesting carrier is impaired when lack of access to an incumbent LEC network element poses a

all of the 251 and 252 unbundling and pricing standards, which the FCC limited in the *TRO* to specific types of loops, subloops, and transport.[8]

Checklist Items Nos. 4, 5, 6, and 10 require ILECs to provide unbundled access to loops, transport, switching and signaling. The FCC has explicitly found that, despite elimination of a number of UNEs under section 251, ILECs must continue to provide access to those UNEs under section 271. However, none of these other checklist items, unlike Checklist Item No. 2, cross reference sections 251(c)(3) and 252(d)(1). Thus, according to the FCC in the *TRO*, UNEs unbundled under Checklist Items Nos. 4, 5, 6 and 9 must only meet the "just and reasonable" standard of 47 U.S.C. §§ 201-202 and not the TELRIC standard required under section 251.

In the FCC's Order granting Verizon 271 authority in Maine,[9] the FCC stated:

> *Working in concert with the Maine Commission*, we intend to monitor closely Verizon's post-approval compliance for Maine to ensure that Verizon does not "cease [] to meet any of the conditions required for [section 271] approval.[10]

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barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic.") *TRO* at ¶¶ 170, 84.

[8]*USTA II* vacated the *TRO*'s findings regarding mass market switching, thereby effectively eliminating switching as a 251 UNE.

[9]*Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization to Provide In-Region, InterLATA Services in the State of Maine,* CC Docket No. 02-61, Order, 17 FCC Rcd 11676 (June 19, 2002) (Maine 271 Order).

[10]*Maine 271 Order* at ¶ 65.

(emphasis added). The FCC referred readers of the *Maine 271 Order* to its *Kansas/Oklahoma 271 Order,* for a more complete description of the 271 enforcement process. The *Kansas/Oklahoma 271 Order* states:

> Furthermore, we are confident that *cooperative state and federal oversight and enforcement* can address any backsliding that may arise with respect to SWBT's entry into the Kansas and Oklahoma long distance markets.[11]

(emphasis added). Thus, the FCC recognized the important role that state commissions would play in enforcing the requirements of section 271. Of more importance, however, is the *Kansas/Oklahoma 271 Order*'s citation to the *New York 271 Order,* which made several relevant findings. First, while noting that Congress had authorized the FCC to enforce section 271 to ensure continued compliance, the New York 271 Order specifically endorsed state commission authority to enforce commitments made by Verizon [then Bell Atlantic] to the New York Public Service Commission. The FCC stated that:

> Complaints involving a BOC's [Bell Operating Company] alleged noncompliance with specific commitments the BOC may have made to a state commission, or specific performance monitoring and enforcement mechanisms imposed by a state commission, should be directed to that state commission rather than the FCC.[12]

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[11] *Joint Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, 16 FCC Rcd 6237, 6241-42, paras. 7-10 (2001) (*SWBT Kansas/Oklahoma Order*), *aff'd in part*, *remanded in part sub nom. Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001) (*Oklahoma/Kansas 271 Order)*.

[12] *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York,* Memorandum Opinion and Order, 15 FCC Rcd 3953 (*New York 271 Order)* at ¶ 452.

Thus, the FCC explicitly recognized the authority of state commissions to enforce 271-related commitments including, but not limited to, performance assurance plans (PAPs). Indeed, the FCC noted "with approval" the fact that the New York PAP "will be enforceable as a New York Commission order."[13]

Turning to Verizon's commitments here in Maine, as stated above, Verizon committed to the following relevant conditions, contained in the March 1, 2002, letter from the Commission:

> 1. Verizon will file a wholesale tariff for Maine no later than October 1, 2002. In the interim, CLECs shall be allowed to amend their interconnection agreements with Verizon in such a manner that enables them to negotiate the inclusion of a single UNE (and any terms and conditions related to the single UNE) rather than be required to sign a multi-part or omnibus amendment which contains provisions unrelated to the single UNE.[14]

In our April 10, 2002 Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of the Telecommunications Act of 1996, we explicitly conditioned our support of Verizon's 271 application upon Verizon's compliance with the list of conditions contained in our March 1, 2002 letter to Verizon, including its commitment to file a wholesale tariff. Specifically, we stated:

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[13]*New York 271 Order* at n. 1353.

[14]March 1, 2004 Letter from Commission to Edward Dinan, President, Verizon Maine.

> The MPUC finds, based upon the record before us, Including the commitments made by Verizon in its March 4, 2002 letter to the MPUC, that Verizon meets the Section 271 Competitive Checklist.[15]

Verizon's commitment to file a wholesale tariff for Maine alleviated certain concerns we had regarding the ability of individual CLECs to negotiate interconnection agreements. Specifically, during the course of our 271 proceeding, we heard from a number of CLECs regarding the difficulties and delays they encountered with Verizon when trying to re-negotiate or amend their interconnection agreements. We found that requiring Verizon to submit a wholesale tariff would simplify the interconnection process for CLECs and provide a single forum for litigating disputes and thus we explained in our Report to the FCC that:

> Unlike some other states, Verizon does not have a Statement of Generally Available Terms (SGAT) or wholesale tariff for the State of Maine. Availability of a wholesale tariff would greatly reduce the time required to effect a valid contract and would also eliminate the possibility of "tying" unrelated sections of an interconnection agreement together when trying to add new terms to an existing agreement. Thus, at our request, Verizon has agreed to file a wholesale tariff for our review by October 1, 2002. This will provide us an opportunity to review all of the terms and conditions that Verizon imposes on CLECs purchasing wholesale services.[16]

[15] Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization To Provide In-Region, InterLATA Services in the State of Maine, CC Docket No. 02-61, Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of Telecommunications Act of 1996 (April 10, 2002) (271 Report to FCC) at p. 1.

[16] 271 Report to FCC at p. 7.

Thus, we found the filing of a wholesale tariff encompassing all of Verizon's wholesale obligations would benefit the CLECs, Verizon, and the Commission by consolidating our review of Verizon's wholesale terms and conditions.

C. Positions of the Parties

1. Verizon.

Verizon’s initial brief did not directly respond to the Hearing Examiner’s question concerning Commission authority to require Verizon to tariff its 271 obligations. In its arguments concerning the availability of specific elements, Verizon admits that in paragraph 653 of the *TRO*, the FCC recognized that former Bell Operating Companies (BOCs) have ongoing access obligations under section 271 of the TelAct but argues that nothing in the TelAct gives a state commission any power to interpret or enforce section 271 requirements. According to Verizon, only the FCC may issue regulations relating to 271 UNEs and only the FCC can set rates for these UNEs. Verizon maintains that the pricing standard set by the FCC for 271 network elements, “just and reasonable,” is not the same as a total element long run incremental cost methodology (TELRIC) used for section 251 UNEs.

In its reply brief Verizon acknowledged that the Commission may play a role in enforcing 271 obligations – for example, by administering the Performance Assurance Plan (PAP) and Carrier to Carrier Guidelines – but argued that this in no way suggests that the FCC has delegated, or could delegate, to state commissions the authority to determine, in the first instance, whether section 271 requires the unbundling of a particular network element, independent of section 251 requirements. Finally, although Verizon does not specifically address state authority under section 271 in its

Supplemental Brief, Verizon states that the "Commission plainly has no authority to order additional unbundling of network elements under the TelAct."

2. Consolidated Intervenors.

In their initial brief, the Consolidated Intervenors state that the FCC "took pains" to confirm that section 271 creates independent access obligations for BOCs and cites paragraphs 653 and 655 of the *TRO*. They also point to the fact that this Commission conditioned its support of Verizon's 271 Application to the FCC on Verizon's willingness to adhere to a number of requirements that it would not otherwise be required to meet under section 251.

In their reply brief, the Consolidated Intervenors urged the Commission to reject Verizon's argument that we do not have authority to enforce 271 obligations. They point to the history of this case, and the fact that Verizon filed the wholesale tariff in compliance with a condition set by the Commission during its 271 review as evidence of the Commission's authority. They assert that Verizon's argument that the Commission has no power to regulate its wholesale tariff "constitutes an outright repudiation of a fundamental premise of the agreement" in the 271 case.

In their Supplemental Brief, the Consolidated Intervenors state that *USTA II* confirms that Verizon has section 271 obligations that are independent of its obligations under section 251. They also interpret the *USTA II* decision to confirm that the *TRO* does not impact a state commission's ability to exercise its power under state and federal law to add to the FCC's list of UNEs.

3. CLEC Coalition.

In its brief, the CLEC Coalition states that the authority for the Commission to require Verizon to tariff its UNE obligations under section 271 comes from the Congressional framework of section 271, Verizon's explicit agreement to the UNE tariffing obligations in Verizon's March 4, 2002 letter, and the plain and unambiguous declarations of the FCC in paragraphs 653-655 of the *TRO*. The CLEC Coalition also concludes that the FCC expressly found that it was the responsibility of both the FCC and state commissions to ensure compliance with section 271. Here, the state should secure compliance by setting prices for UNEs established pursuant to section 271. Finally, the CLEC Coalition argues that the Commission must exercise its 271 authority over Verizon, because if the state does not, no one will; the FCC is simply without the resources. The absence of state action would have a drastic effect on the competitive landscape in Maine. In their reply brief, the CLEC Coalition concurred with the Consolidated Intervenors and urged the Commission not to let Verizon break its agreement to meet the obligations it agreed to during the 271 approval process.

D. <u>Analysis</u>

As stated above, at the time of Verizon's 271 proceeding, Verizon's unbundling obligations under 251/252 of the TelAct were the same as its 271 unbundling obligations and thus there was no need to distinguish between the two types of requirements. Now that they are different, we must determine both the scope of Verizon's commitment to file a wholesale tariff and whether this Commission has authority to require Verizon to file a tariff in Maine reflecting its 271 unbundling obligations, i.e. its obligations under Checklist Items 4, 5, 6, and 9.

First, with regard to the scope of Verizon's commitment to file a wholesale tariff in Maine, we examine the underlying purposes of the condition and find that the same reasons for requiring a wholesale tariff encompassing Verizon's 251 obligations apply equally to Verizon's 271 obligations. Indeed, they apply even more today when the legal and regulatory landscape has become increasingly confusing and complex, making it difficult to completely address and negotiate all of the issues that may come up in an interconnection agreement negotiation. In the Verizon Arbitration proceeding,[17] CLECs complained that Verizon has not responded to requests from CLECs to negotiate amendments to their interconnection agreements. These are the same types of complaints we heard during the 271 process which led us to adopt the wholesale tariff condition in this first place. Finally, Verizon has not argued to us that it did not commit to tariff all of its wholesale obligations. Instead, it focuses on the jurisdictional issues without examining the motivations and intentions behind its 271 commitment. We find that a reasonable interpretation of the condition we placed upon Verizon, and the condition it committed to fulfill, requires Verizon to include both its 251 and 271 unbundling obligations in its wholesale tariff filed in Maine.

We turn now to our authority to enforce that commitment. While Verizon is correct that section 271(d)(6) allows for continued enforcement of an ILEC's 271 obligations by the FCC, Verizon fails to explain adequately why states have authority over some 271 issues, such as performance assurance plans, and not others. Previously, state commissions did not have authority to approve an ILEC's 271

[17] *Investigation Regarding Verizon Maine's Request for Consolidated Arbitration*, Docket No. 2004-135, Order (June 4, 2002).

application but were allowed, indeed encouraged, by the FCC to conduct extensive fact-finding proceedings to ascertain whether the terms, conditions, and prices of an ILEC's wholesale operations met 271 standards. While the FCC made the ultimate finding of compliance, it relied heavily upon the work of state commissions. Indeed, the FCC noted in its *Maine 271 Order*:

> 3. We wish to recognize the effort and dedication of the Maine Public Utilities Commission (Maine Commission). In smaller, more rural states, the section 271 process taxes the resources of the state commissions, even more heavily than in other states. Yet, by diligently and actively conducting proceedings beginning in 1997 to set TELRIC prices, to implement performance measures, to develop a Performance Assurance Plan (PAP), and to evaluate Verizon's compliance with section 271 of the Act, the Maine Commission laid the necessary foundation for our review and approval. We are confident that the Maine Commission's efforts, culminating in the grant of this application, will reward Maine consumers by making increased competition in all markets for telecommunications services possible in the state.
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> 5. We rely heavily in our examination of this application on the work completed by the Maine Commission. . . .

We find that states have a similar role with regard to enforcement of 271 obligations. Indeed, it makes both procedural and substantive sense to allow state commissions, which are much more familiar with the individual parties, the wholesale offerings, and the issues of dispute between the parties, to monitor ILEC compliance with section 271 by applying the standards prescribed by the FCC, i.e. ensuring that Verizon meets its Checklist Items No. 4, 5, 6, and 9 obligations.

As indicated above, the FCC has already clearly stated that states may enforce commitments made by ILECs during the 271 process. Here, where the commitment involves filing a wholesale tariff, we believe we also have authority to review that tariff for compliance with the applicable federal and state requirements. If a party believes the Commission has not applied the correct standard, the party may then file an action with the FCC pursuant to 47 U.S.C. §271(d)(6) and the FCC will have the benefit of the detailed factual record developed by us. Nothing about our review of Verizon's wholesale tariff preempts or invalidates the FCC's authority under section 271(d)(6). If the FCC disagrees with the position we take here, it can explain itself in any order issued on appeal. In the meantime, our decision will provide a single litigation proceeding to resolve the myriad of issues resulting from the *TRO* and *USTA II.*

In addition to the legal basis for our decision, our decision also addresses a significant practical consideration facing the Commission. Specifically, from a Commission resource perspective, it makes much more sense to litigate all of the issues associated with unbundling in one docket and develop a standard offer or Statement of Generally Available Terms (SGAT). A single litigated case ensures that we receive the benefit of briefing on an issue from all interested parties, rather than rely on individual litigants to brief issues that may, or may not, be important to them. Individual litigation diverts Commission resources from addressing matters that impact all carriers to issues that may only affect one or two carriers.

Finally, we note that 35-A M.R.S.A. § 304 requires that all utilities file schedules containing the rates, terms, and conditions for any service performed by it within the State. We have previously interpreted this provision to require filing of wholesale rates with the Commission, i.e. services which are resold to other carriers or special contracts made with specific customers. For example, Verizon has on file with the Commission a state access tariff through which it offers many UNE-like services, such as high capacity transport. Thus, subject to the specific finding below, we require Verizon to file both its terms and conditions and rates for all of its 251 and 271 obligations in its Maine wholesale tariff.

IV. COMMISSION AUTHORITY TO SET PRICES FOR § 271 OFFERINGS

A. Introduction

Now that we have determined that Verizon must tariff its 271 obligations, we must consider the extent of our authority to set rates for those 271 offerings. Under state law, our authority is clear: 35-A M.R.S.A. § 301 requires that rates be just and reasonable and gives the Commission the authority to determine whether a utility's rates meet this standard. The Commission's authority under federal law is not as clear and requires a review of sections 251 and 252 of the TelAct, the *TRO*, and *USTA II.*

B. Applicable Law

Section 252 of the TelAct requires state commissions to apply the pricing standards found in section 252(d) to set the rate for interconnection pursuant to section 251(c)(2) and for UNEs unbundled pursuant to section 251(c)(3). Section 252(d) requires that the rate be based upon cost, be nondiscriminatory, and may include a reasonable profit. This standard has been interpreted by the FCC (and upheld by the

Supreme Court[18]) to require forward-looking TELRIC pricing for all UNEs unbundled pursuant to section 251 of the TelAct.

Section 271 does not contain its own pricing standard. Section 271(c)(2)(B)(ii) (Checklist Item No. 2) requires that ILECs make UNEs available "in accordance with the requirements of section 251(c)(3) and 252(d)(1)" while sections 271(c)(2)(B)(iv, v, vi, and x) (Checklist Items Nos. 4, 5, 6 and 10), which provide for access to loops, switching, trunk side transport, and databases, make no reference to a pricing standard.

In the *TRO*, the FCC interpreted the pricing provisions of the TelAct as requiring TELRIC pricing for section 251(c)(3) elements only and "just and reasonable" rates for 271(c)(2)(B)(iv, v, vi, and x) elements. The FCC found that TELRIC pricing for non-251 UNEs "is neither mandated by statute nor necessary to protect the public interest."[19] Relying upon the Supreme Court's holding in *Iowa II* that section 201(b) of the Communications Act empowered the Commission to adopt rules that implement the TelAct, the FCC found that it had authority to impose the just and reasonable and nondiscriminatory standard of sections 201 and 202 of the Communications Act. The FCC went even further and found that it would determine, based upon a fact-specific inquiry pursuant to a section 271 application or a 271 enforcement action, whether the price for a particular 271 element met the section 201/202 standard.[20] The FCC noted

[18]*See AT&T v. Iowa Utilities Bd.,* 525 U.S. 355 (1999)(*Iowa II)*.

[19]*TRO* at ¶ 656.

[20]*TRO* at ¶ 664.

that prices similar to those currently charged in ILEC access tariffs would likely meet the standard, as would any prices negotiated through arms-length agreements.[21]

In its March 2004 decision in *UTSA II*, the D.C. Circuit affirmed the FCC's finding that the pricing standard for UNEs unbundled pursuant to § 271 is found in sections 201-202 of the TelAct and not section 251. Specifically, the court upheld the FCC's determination that TELRIC pricing was not required under section 271; all that was required was that the prices not be "unjust, unreasonable or discriminatory."[22] The Court did not address the FCC's assertion that it, rather than state commissions, should determine whether the price for a 271 element meets the just and reasonable standard. The Court did find, in the context of state unbundling authority, that claims relating to the preemptive scope of the *TRO* were not ripe, because no party had challenged a specific state decision.

Since the *USTA II* decision was released, several state commissions have directly addressed the issue of state authority to review pricing for 271 elements. The Massachusetts Department of Telecommunications and Electricity recently found that it could approve or deny, on the basis of market-based pricing, the prices included in Verizon's wholesale tariff for its §271 obligations because those services are jurisdictionally intrastate.[23] On June 21, 2004, the Tennessee Regulatory Authority (TRA) issued an order which sets a 271 switching rate in the context of a section 252

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[21] *Id.*

[22] *USTA II* at 53.

[23] *Proceeding by the DTE on its own Motion to Implement the Requirements of the FCC's TRO Regarding Switching for Large Business Customers Serviced by High-Capacity Loops*, DTE 03-59-A (Jan. 23, 2004), fn. 9.

arbitration proceeding.[24] Bellsouth has appealed that decision to the FCC and asked for an emergency declaratory ruling by the FCC that the action taken by the TRA violates the TelAct, FCC Orders, and federal precedent. The FCC has asked for comment on Bellsouth's petition.

C. Position of the Parties

1. Verizon.

Verizon argues that the *TRO* makes clear that the FCC has exclusive jurisdiction over the pricing of 271 UNEs and that the "just and reasonable" standard, rather than TELRIC, should be applied to the rates for those elements. Verizon contends that even if TELRIC prices meet the "just and reasonable" standard, there is nothing that precludes Verizon from charging higher rates that also meet the "just and reasonable" standard. Verizon argues that the Commission would have no grounds for insisting on the lower TELRIC rate. Verizon also points out that while state commissions have authority to set rates for section 251 UNEs, there is no similar grant of authority for section 271 UNEs.

2. CLECs.

The CLEC Coalition argues that by agreeing to submit a wholesale tariff, Verizon agreed to file rate schedules for 271 UNEs over which the Commission would have the authority to review, accept, and/or reject. The Consolidated Intervenors did not directly address the Commission's authority to set prices for 271 UNEs because

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[24] *In the Matter of Bellsouth Emergency Petition for Declaratory Ruling and Preemption of State Action*, WC Docket No. 04-__ (July 1, 2004) at 1.

they believed, despite the specific questions posed in the Hearing Examiner's Procedural Order, that pricing issues would be addressed later.[25]

D. Analysis

Determination of the scope of the Commission's 271 pricing authority requires both interpretation of the *TRO* and a determination under both state and federal law of the Commission's authority to set rates for intrastate services and products. First, Verizon is correct that the FCC stated in the *TRO* that it would review rates for 271 UNEs in the context of 271 applications and enforcement proceedings. However, as described above and as acknowledged by Verizon, the FCC has already delegated significant authority to state commissions to enforce 271-related requirements. While the FCC stated it would conduct the review, the FCC did not specifically preclude state commissions from also conducting such an evaluation.

There are a number of factors which could support a state commission's authority to set prices for section 271 UNEs. First, the standard the FCC has announced for section 271 UNEs, "just and reasonable," is the same standard the Commission applies under 35-A M.R.S.A. § 301. Thus, the Commission has considerable experience in applying this standard to the rates of Verizon and many other public utilities. Further, state commissions, and not the FCC, are most familiar with the detailed company-specific data that will be used to support an ILEC's claim that particular rates are just and reasonable. Finally, both CLECs and the National

[25]It is true that pricing issues were scheduled to be addressed later in the proceeding. However, parties should have reasonably expected that if a specific question relating to the legal underpinnings of the Commission's authority was posed for briefing, that the question needed to be addressed.

Association of Regulatory Utility Commissioners (NARUC) have argued in filings related to the appeal of the *TRO*, that the Supreme Court's decision in *Iowa II* and the Eighth Circuit's decision in *Iowa III*[26] clearly establish that states, not the FCC, set rates for UNEs. Indeed, the Supreme Court stated that:

> [Section] 252(c)(2) entrusts the task of establishing rates to the state commissions …. The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in 252(d). It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.[27]

These same parties also point to a state commission's authority to arbitrate and approve interconnection agreements pursuant to section 252 of the TelAct as another source of authority to set rates for elements provided pursuant to section 271.

Notwithstanding these arguments in favor of Commission authority to set 271 UNE rates, we decline at this time to exercise that authority. While we do not necessarily agree with the FCC's assertion of exclusive jurisdiction over 271 UNE rates, it is, nonetheless, the current law of the land. Rather than add an additional layer of confusion to an already complex situation, we will allow time for the process envisioned by the FCC to work, i.e., for Verizon to file federal tariffs or for the parties to reach arms-length agreements. While we will not set the rates charged by Verizon, we will exercise our authority to require Verizon to file those rates with us in its wholesale tariff. Indeed, before Verizon may begin charging any CLEC 271 UNE rates which are higher than its current TELRIC rates, Verizon must first obtain the FCC's approval for the specific rates

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[26]*Iowa Utilities Board v. FCC,* 219 F.3d 744 (8th Cir. 2000).

[27]*Iowa II,* 525 U.S. at 384.

(in whatever form necessary) and then must file the rates here pursuant to our usual tariffing process. We will suspend any rates filed with us which have not been specifically approved by the FCC.

We leave open today the possibility that in the future, perhaps after the FCC has ruled on the BellSouth Emergency Petition or if the Supreme Court takes the *TRO* appeal and reverses the *USTA II* decision, we might revisit the issues decided today. We also leave open the possibility that we will step in and take action if the FCC abdicates its authority, either explicitly or by taking an undue amount of time to exercise its authority. We firmly believe that *all* parties would greatly benefit from increased certainty concerning wholesale pricing and if the FCC does not actively assert its jurisdiction, we will assert ours so as to ensure the continued viability of local competition in Maine.

V. COMMISSION AUTHORITY TO ORDER LINE SHARING PURSUANT TO STATE LAW

A. Legal Authority

In the *TRO*, the FCC overturned its earlier decision in the *UNE Remand Order*[28] and found that CLECs are not impaired without access to the high frequency portion of the loop (HFPL), i.e. access to line sharing. Specifically, the FCC shifted its focus from the revenues derived from a single service deployed using the HFPL to the potential revenues derived from all services that could be provided over the full functionality of the loop. Thus, the FCC concluded that the increased operational and

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[28] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket 96-98, Third Report and Order And Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, rel. November 5, 1999 (*UNE Remand Order*).

economic costs of acquiring a stand-alone loop are offset by the increased revenue opportunities afforded by use of the whole loop for services such as voice, voice over xDSL, data and video services.[29] While the FCC declined to explicitly find that any decision by a state commission to require line sharing under state law was automatically preempted, in paragraph 264 it invited any party aggrieved by such a decision to seek a declaratory ruling from the FCC.

In *USTA II*, the D.C. Circuit upheld the FCC's line sharing decision, finding that:

> [E]ven if the CLECs are right that there is some impairment with respect to the elimination of mandatory line sharing, the Commission reasonably found that other considerations outweighed any impairment.

USTA II at 45. Thus, under federal law, section 251 line sharing will only be available on a grandfathered basis for the next three years, with the price increasing each year until it reaches the full price of the loop, at which time unbundling will no longer be required.

Neither the *TRO* or *USTA II* directly addressed whether an ILEC's continuing unbundling obligations under section 271 include continued access to line sharing with the ILECs. In its *Line Sharing Order,*[30] the FCC discussed the necessity of unbundling the HFPL as part of an ILEC's 251 unbundling obligations. In its *Oklahoma/Kansas 271 Order,* the first 271 Order issued after the *Line Sharing Order*,

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[29]*TRO at* ¶ 258.

[30]*Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147, 96-98, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912 (1999) (*Line Sharing Order).*

the FCC included its discussion of compliance with the line sharing requirement under its discussion of compliance with Checklist Item No. 4, access to local loops.[31] In the *Massachusetts 271 Order*, the FCC explicitly stated that:

> On December 9, 1999 the Commission released the *Line Sharing Order* that, among other things, defined the high-frequency portion of local loops as a UNE that must be provided to requesting carriers on a nondiscriminatory basis pursuant to section 251(c)(3) of the Act and, thus, checklist items 2 and 4 of section 271.[32]

Thus, the FCC appears to consider line sharing a form of access to the local loop that must be provided pursuant to section 271, regardless of whether it must also be provided pursuant to section 251.

B. Positions of the Parties

1. Verizon.

Verizon argues that in the *TRO*, the FCC determined that CLECs are not impaired without unbundled access to line sharing. Verizon argues that where federal law sets forth the legal and regulatory framework for accomplishing a lawful objective through the balancing of competing interests, “the states may neither alter that framework nor depart from the federal judgment regarding the proper balance of competing regulatory concerns.” Citing section 251(d)(3) and “long-standing federal preemption principles,” Verizon asserts that state commissions have no authority to override the FCC’s determination that the unbundling of certain network elements is not required under the TelAct.

[31] *Oklahoma/Kansas 271 Order* at ¶ 214.

[32] *In the Matter of Application of Verizon New England, Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order (April 16, 2001) at ¶ 163 (*Verizon MA 271 Order*).

Verizon contends that the Commission has no independent authority under state law to impose additional unbundling requirements on Verizon. This is especially true where the FCC has explicitly declared that line sharing is not required. Verizon points out that the FCC authorized the state to perform “granular” review of specific elements only and that line sharing was not one of them.

Verizon further argues that the Commission does not have authority to order unbundling under section 271, but even if it did, Checklist Item No. 4 - the local loop - does not include separate access to the HFPL. Additionally, it argues that the pricing would not be TELRIC but would be “just and reasonable” which would require a “fact specific inquiry” conducted by the FCC.

In its Reply Brief, Verizon reiterated its position that “[t]he Commission is legally preempted from re-imposing unbundling obligations eliminated by the FCC’s rulings in its *TRO*.” In particular, Verizon disputes the CLECs’ claim that the Commission has separate state authority to order line sharing and states that, “where the FCC determines that an element should not be unbundled, a state may not lawfully override that determination.” Verizon also refutes the CLECs’ claim that the Commission can unbundle HFPL based on Maine specific facts. Since the FCC has already found no impairment, they conclude, the Commission is not free to order line sharing.

In its Supplemental Brief, Verizon asserts that *USTA II* affirms the FCC’s findings in the *TRO* on line sharing and unambiguously struck down the FCC's delegation of any unbundling authority to states.[33] Verizon also repeats its belief that

[33] *USTA II* at 12.

the “Commission may not lawfully rely on state law to impose an unbundling obligation for line sharing, feeder subloops, OCN transport, entrance facilities or other UNEs expressly eliminated or curtailed by the FCC in the *Triennial Review Order*.” Referring to its previous statements concerning the absence of state law authorizing unbundling, Verizon argues that even if the state is authorized to order unbundling (which they insist, it is not), it may not do so in the case of line sharing because *USTA II* affirmed the FCC’s decision in the *TRO* not to order line sharing because it discourages investment.

2. CLECs.[34]

In their Brief, the Consolidated Intervenors point to the Commission’s reliance upon Verizon’s performance in Maine on the number of line sharing arrangements when it found Verizon in compliance with Checklist Item No. 4 during Maine’s 271 proceeding. They contend that allowing Verizon to discontinue line sharing now effectively repudiates one of the conditions for the Commission’s support and is anti-competitive. The Consolidated Intervenors argue that the FCC took pains to make clear that 271 requirements remain unaffected by the *TRO* (citing to ¶¶ 653, 655). They suggest that the Commission follow the Pennsylvania Public Utilities Commission’s lead in insisting that Verizon honor its 271 obligations. Finally, they cite 35-A M.R.S. A. § 7101 and argue that Verizon’s proposal contradicts state telecommunications policy of promoting broadband, especially in rural areas. The Consolidated Intervenors argue that the Commission should order line sharing because it has been instrumental in creating and fostering competition in rural Maine.

[34]The CLEC Coalition did not brief the line sharing issues but “supports the arguments and conclusions set forth in the briefs on Line Sharing issues submitted by GWI, Conversant and the Office of the Public Advocate”.

In their Reply Brief, the Consolidated Intervenors again describe how Verizon and the Commission relied on the provisioning of line sharing to show that Verizon had opened up its network to competition during the 271 review. The Consolidated Intervenors also cite to paragraph 650 of the *TRO* where the FCC states that "Section 271(c)(2)(B) establishes an independent obligation for BOCs to provide access to loops…." The Consolidated Intervenors implore the Commission to enforce Verizon's 271 obligations.

In their Supplemental Brief, the Consolidated Intervenors state that the decision in *USTA II* confirms the FCC's conclusion that section 271's unbundling requirements for BOCs are independent of a BOC's section 251 requirements. They also argue that "the Court essentially held that the *TRO* has no impact whatsoever, from a legal standpoint, on a state Commission's ability to exercise its power under state and federal law to add to the FCC's list of UNEs."

C. <u>Decision</u>

We find, based upon the language quoted above from the FCC's *Massachusetts 271 Order,* that Verizon must continue to provide CLECs with access to line sharing in order comply with Checklist Item No. 4 of section 271. As discussed above, however, we will not exercise any authority we might have to set rates for 271-based UNEs such as line sharing and will leave those issues to the FCC, which has already stated what it believes to be the fair rate, i.e. three years of transition rates leading to up to the full cost of the loop. While our decision today does not provide the CLECs with all of the relief they requested, it does provide them with the continued opportunity to share lines with Verizon, which retains the majority of local service lines in Maine.

We decline the opportunity to exercise any authority we have under either federal or state law to order line sharing at TELRIC rates at this time. While we do not concede the point as argued by Verizon, the FCC clearly intended to preempt state authority to order line sharing pursuant to section 251 or state law. Section 251(d)(3) of the TelAct states that the FCC may not preclude enforcement of any state commission decision establishing local exchange interconnection and access requirements which is consistent with section 251 and which "does not substantially prevent implementation of the requirements of this section." In the *TRO,* the FCC asserts that its interpretation of the requirements of section 251, i.e., its rules, was intended by Congress to be included under the "requirements of this section" language of section 251(d)(3).[35] Thus, according to the FCC, any state decision that is inconsistent with the FCC's Orders or Rules (the so-called "federal regime") violates section 251(d)(3) and is preempted. Any party aggrieved by a state decision to require line sharing after the effective date of the *TRO* can seek a declaratory ruling from the FCC

The Supreme Court has held that "preemption will not lie unless it is 'the clear and manifest purpose of Congress.'"[36] If the statute contains an express preemption clause, the court will first focus on the plain wording of the clause, "which necessarily contains the best evidence of Congress' preemptive intent."[37] Savings

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[35]*TRO* at ¶ 191.

[36]*CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) *citing Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947).

[37]*Id*.

clauses, which specifically reserve state authority, are "the best evidence of Congress' preemptive intent."[38] Generally speaking, preemption will be found when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[39]

The FCC's assertion that its rules are included in "the requirements of this section" language of section 251 was specifically rejected by the Eighth Circuit Court of Appeals in *Iowa I.*[40] The Eighth Circuit held that section 251(d)(3) does not require state commission orders to be consistent with all of the FCC's regulations promulgated under section 251.[41] It stated that "[t]he FCC's conflation of the requirements of section 251 with its own regulations is unwarranted and illogical."[42] While portions of the Eighth Circuit's decision were ultimately reversed by the Supreme Court, the FCC did not challenge, nor did the Supreme Court reverse, the Eight Circuit's holding on section 251(d)(3).[43] Thus, contrary to the assertions of both the FCC and Verizon, the mere fact that a state requires an additional unbundled element does not mean it

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[38]*Id*.

[39]*Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-373 (2000).

[40]*See Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd sub nom. on other grounds, AT&T v. Iowa Utilities Bd.*, 525 U.S. 366 (1999).

[41]*Id*. at 806.

[42]*Id*. It further held that section 261(c) of the TelAct (which requires state commission decisions to be consistent with the FCC's regulations) applies only to state requirements that are not promulgated pursuant to section 251. *Id*. at 807.

[43]*See TRO* at ¶ 192, fn. 611.

automatically will be preempted. Instead, consideration must be given to whether the requirement is consistent with section 251 and whether it prevents its implementation.

We find that, with respect to line sharing, there has been a clear policy decision at the federal level that line sharing should not be made available at TELRIC pricing. Any decision on our part, whether based upon federal or state law, to require line sharing at TELRIC prices would directly contradict federal policy and would, in fact, substantially prevent implementation of section 251 as interpreted by the FCC.[44] We do not reach the issue of whether the FCC's interpretation of 251 would limit state authority in every instance but instead find that here, with regard to line sharing, and where the federal policy has been so clearly enunciated and upheld by the D.C. Circuit, that the most appropriate action at this time requires denial of the CLECs' request for state-ordered unbundling at TELRIC rates. We leave open the possibility that if, at some future date the Supreme Court overturns the FCC's interpretation of its powers of preemption and/or overturns the FCC's decision concerning line sharing, we might revisit this issue and reach a different result. Until such time, the only line sharing that will be available in Maine will be pursuant to section 271 at "just and reasonable rates" as determined by the FCC.

[44] *But see*, *Investigation into Skowhegan Online's Request for UNE Loops*, Docket No. 2002-704, Orders (April 20, 2004 and June 16, 2004) where the Commission asserted its authority under 35-A M.R.S.A. §§ 301, 7101 and ordered Verizon to unbundle certain copper subloops not required under federal law.

VI. CONCLUSION

For the reasons discussed above, we order Verizon to include 271 UNEs in its state wholesale tariff and to continue to offer line sharing pursuant to Checklist Item No. 4 of section 271.

Respectfully submitted,

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Hearing Examiner